LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1091

MUNICIPAL DISTRIBUTOR GROUP, *Petitioner*,

v.

FEDERAL POWER COMMISSION, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Reuben Goldberg
Leo J. Steffen, Jr.
1250 Connecticut Avenue
Washington, D.C. 20036

George E. Morrow
Union Planters National Bank Bldg.
Memphis, Tennessee 38103

Charles F. Wheatley, Jr.
Watergate Office Building
2600 Virginia Avenue
Washington, D.C. 20037

Attorneys for Municipal Distributor Group

September 9, 1970.

Washington, D. C. THIEL PRESS 202 393-0625

INDEX

OPINIONS BELOW 2
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTE INVOLVED 3
STATEMENT 3
REASONS FOR GRANTING THE WRIT 13
CONCLUSION 22
APPENDIX A . . . . . A. 1
APPENDIX B . . . . . B. 1
APPENDIX C . . . . . C. 1
APPENDIX D . . . . . D. 1
APPENDIX E . . . . . E. 1

AUTHORITIES CITED

Cases

Area Rate Proceeding, Docket No. AR61-1, 24 FPC 1121 (1960) 5
Atlantic Refining Co. v. Public Service Comm'n, 360 U.S. 378 (1959) 14, 16, 17
FPC v. Amerada Petroleum Corp., 379 U.S. 687 (1965) 20
FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) 14, 17
FPC v. Interstate Gas Co., 336 U.S. 577 (1949) 14, 22
FPC v. Southern Cal. Edison Co., 376 U.S. 205 (1964) 14
FPC v. Sunray DX Oil Co., 391 U.S. 9 (1968) 17
FPC v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962) 14
FPC v. Raladam Co., 283 U.S. 643 (1931) 21
Hope Natural Gas Co. v. FPC 196 F.2d 803 (CA 4, 1952) 9, 16, 17
International Union v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335 (1945) 19, 20

Montana-Dakota Util. Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) 17, 21

Pan American Petroleum Corporation v. FPC, 322 F.2d 999 (CADC, 1963) 19

Permian Basin Area Rate Cases, 390 U.S. 745 (1968) 5, 18

Public Service Comm'n of New York v. FPC, 257 F.2d 717 (CA 3, 1958) 20

State Corporation Commission of Kansas v. FPC, 215 F.2d 176 (CA 8, 1954) 17, 18, 19, 21

Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 19

Statutes

Natural Gas Act (52 Stat. 821-833, 15 USC 717-717w):

Section 4(d) 4, 16

Section 4(e) 4, 6, 9, 16

Section 5(a) 4, 9, 16

Section 16 . . . . . 3, 9, 18, 19

Section 19(b) 2, 3, 11, 19, 21

Miscellaneous

Brief of Municipal Distributor Group, CA 5, No. 27492 9

Petition for Rehearing of Humble Oil & Refining Co., et al., CA 5, No. 27492 . . . . . 10, 15

Petition for Rehearing of Amerada Hess, CA 5, No. 27492 10

Response of Federal Power Commission to Petitions for Rehearing, CA 5, No. 27492 . . . . . 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

MUNICIPAL DISTRIBUTOR GROUP, *Petitioner,*

v.

FEDERAL POWER COMMISSION, et al.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Municipal Distributor Group ("MDG")[2] petitions for a writ of certiorari to review the judgment of the United

---

[1] The additional respondents are listed in Appendix D to this petition.

[2] The Municipal Distributor Group comprises Memphis Light, Gas and Water Division operating municipal gas, electric and water systems in Memphis, Tennessee, and surrounding Shelby County, Tennessee, nine other Tennessee public systems, and American Public Gas Association, having a membership of 201 public systems operating in 28 states.

States Court of Appeals for the Fifth Circuit in this case entered March 19, 1970.[3]

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit issued March 19, 1970, and the opinion of the Court of Appeals issued June 16, 1970, denying the petitions for rehearing are not yet officially reported. They are printed as Appendix A and Appendix B, respectively, to this petition. Opinion No. 546 and accompanying order of the Federal Power Commission issued September 25, 1968 is reported in 40 FPC 530. Opinion No. 546-A and accompanying order of the Federal Power Commission issued March 20, 1969 is reported in 41 FPC 301.

JURISDICTION

The judgment of the court of appeals, printed as Appendix E, was entered on March 19, 1970. The court of appeals denied the petitions for rehearing by an opinion issued June 16, 1970, printed as Appendix B. The mandate was issued July 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

In its supplemental opinion issued June 16, 1970, denying the petitions for rehearing, the court below ruled for the first time that the Commission, notwithstanding the court's

---

[3]Following the entry of judgment on March 19, 1970, numerous petitions for rehearing were filed. On June 16, 1970, the court below entered its supplemental opinion denying the petitions for rehearing. Thereafter, on July 14, 1970, the judgment was issued as the mandate.

affirmance of the Commission's rate orders, can adjust the rate orders retroactively by reason of the provisions of Section 16 of the Natural Gas Act and the equitable powers of the court pursuant to Section 19(b) of the Natural Gas Act, which powers the court below undertook to confer upon the Commission. The questions presented by this ruling are:

1. Whether the court below correctly held that the Commission is empowered under Section 16 of the Natural Gas Act to revise retroactively the rates prescribed by the Commission's rate orders notwithstanding the court's affirmance thereof.

2. Whether the court below correctly held that through the exercise of its equitable powers it has the power to revise the rates retroactively notwithstanding affirmance of the orders and to confer the court's equitable powers upon the Commission, thereby empowering the Commission to revise the rates retroactively.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w are set out in Appendix C to this petition.

STATEMENT

Proceedings Before the Commission

In May 1961, the Federal Power Commission ("Commission") initiated an investigation to determine and fix the just and reasonable ceiling rates for all sales by independent producers of natural gas in interstate commerce from Southern Louisiana, including the area offshore Louisiana in the

Gulf of Mexico[4] (40 FPC 542). The Commission has described this area, particularly the offshore area, as constituting at the present time and for the foreseeable future a principal area of development of natural gas in the United States (40 FPC 542, 544-46).

The Commission initiated the investigation under Section 5(a) of the Natural Gas Act (Act)[5] and named as respondents 252 natural gas producers. The Commission also consolidated with the proceedings 199 Section 4(e)[6] proceedings involving 70 of the 252 producers (40 FPC 542). Numerous distributors of natural gas, private and public, interstate natural gas pipeline companies, state regulatory commissions, other interested parties, and the Commission's Staff participated in the proceedings.

Prehearing conferences and other meetings were held in an effort to bring the massive proceedings within manageable proportions. After these conferences and meetings had taken place, the cases-in-chief were prepared and served in advance of hearing and were placed in evidence on December 10, 1963. Rebuttal evidence was placed in evidence on March 24, 1964. Cross-examination commenced on April 23, 1964.

---

[4]The Commission has defined this area to include all parts of the State of Louisiana south of the thirty-first parallel, including all areas, both State and Federal, in the Gulf of Mexico off the shore of Louisiana. (40 FPC 542)

[5]Section 5(a) clothes the Commission with the authority to initiate rate investigations on its own motion and, after hearing, to fix just and reasonable rates which are to be prospectively effective, i.e., from and after the date of issuance of the Commission's order fixing the just and reasonable rates (App. C, p. C. 3).

[6]Section 4(e) proceedings resulted from the unilateral filing of notices of rate changes by producers under Section 4(d) of the Act. When filed they are subject to suspension for a five-month period, and if the rate investigation thereby initiated is not concluded at the end of the suspension period, the increased rates may be made effective subject to refund. (App. C, pp. C. 2-3).

The hearings, with recesses, continued until the record was closed on November 5, 1965. The hearings produced a transcript of more than 34,000 pages, about 300 exhibits (most of them voluminous), and many items by reference (for the most part also voluminous).

The Presiding Examiner's decision was issued December 30, 1966 (40 FPC 703-902). After hearing oral argument *en banc*, on May 15 and 16, 1967, the Commission on September 25, 1968 issued its Opinion No. 546 and accompanying order (40 FPC 530-702).[7] After consideration of applications for rehearing and motions to reopen, the Commission on March 20, 1969 issued its supplemental Opinion No. 546-A and accompanying order (41 FPC 349). By the supplemental opinion and order, the Commission modified the original opinion and order in part, denied the motions for stay filed by many producers, and in all other respects denied the applications for rehearing.

Opinions No. 546 and 546-A and Accompanying Orders

The Commission established three vintages of natural gas and established the following as the just and reasonable ceiling rate for each vintage (40 FPC 544):[8]

[7] The decision was issued after this Court on May 1, 1968 had sustained in their entirety the rate orders issued by the Commission in its first effort to fix producer rates on an area, rather than an individual company, basis. The first proceeding involved the Permian Basin. *Area Rate Proceeding*, Docket No. AR61-1, 24 FPC 1121 (1960), affirmed, *Permian Basin Area Rate Cases*, 390 U.S. 745 (May 1, 1968).

[8] The Commission fixed January 1, 1961 as the date of division between "new gas-well gas and old gas-well gas". The latter type is also called "flowing gas" by the Commission (40 FPC 555).

Vintage	Rate	
	On-Shore	Off Shore
	(cents per Mcf)	
All casinghead or oil well[9] gas (gas produced in association with oil) and pre-1961 gas-well gas (including residue gas derived from it) [old or flowing gas-well gas]	18-1/2	17
Gas-well gas sold under contracts dated January 1, 1961 through September 30, 1968 [new gas-well gas]	19-1/2	18
Gas-well gas sold under contracts dated October 1, 1968 or later [new gas-well gas]	20	18-1/2

The difference between on-shore and off-shore prices of 1-1/2 cents per Mcf represented the Commission's allowance in on-shore gas prices for Louisiana severance tax (40 FPC 544).

All of the prices were subject to upward and downward adjustment for heating value (Btu content) and the third vintage rates were also subject to reductions in the event of deviation from specified quality standards.

The rates for second vintage gas-well gas and the even higher rates for third vintage gas were awarded to elicit supply and to encourage continuation of necessary exploration and development.

With respect to rates collected by producers under Section 4(e) of the Act, the Commission ruled that refunds would be required by further order of the Commission of

---

[9]The Commission found that casinghead gas is discovered largely as a product of the search for oil and therefore exploration for it could not be encouraged by awarding such gas the higher second and third vintage rates. The Commission, for this reason, fixed the rates for casinghead gas irrespective of vintage at the first vintage rates (40 FPC 590-91).

the difference between the just and reasonable rate prescribed in Opinion No. 546 and the rate collected subject to refund (40 FPC 626). With respect to all other rates, the Commission ordered that the collection of rates in excess of the applicable area rate established in Opinion No. 546 from and after September 25, 1968, the effective date of the opinion, shall be subject to refund, plus interest at 7 percent.

The Commission ordered that these ceiling prices would be subject to change only in accordance with the procedure prescribed in Opinion No. 546. Under the procedure there prescribed, any seller seeking to charge rates in excess of the ceiling prices or requesting a change thereof must file a petition for waiver of the Commission-prescribed price and must justify fully the relief sought (40 FPC 650). Unless and until the Commission grants the petition, the seller may not file rate increases in excess of the applicable area rate prescribed in Opinion No. 546 (40 FPC 650). These rate-change provisions have been commonly described as prescribing an indefinite moratorium on rate changes.

The ceiling prices prescribed by the Commission were based on a 12 percent overall rate of return on rate base, which on a capital structure consisting of 85 percent common stock equity capital and 15 percent debt capital at an average cost of 4.5 percent, yielded approximately 13.3 percent return on common stock equity (40 FPC 579, 601).

After consideration of applications for rehearing, the Commission on March 20, 1969 issued its Opinion No. 546-A and accompanying order modifying in part and confirming in part Opinion No. 546 and order.

The Commission re-affirmed that the rates established in Opinion No. 546 were just and reasonable. The Commission, however, while re-affirming that 18.5 cents per Mcf was the just and reasonable rate for offshore third vintage gas, exempted such gas from the rate change procedure prescribed by the Commission and authorized producers of such gas to file for contractually authorized increases up to

20 cents per Mcf, subject to suspension and possible refund (41 FPC 306-07). The Commission also limited the application of the rate change procedures for third vintage onshore gas sales to a five year period ending January 1, 1974 (41 FPC 308-09).

Proceedings Before the Court Below

Petitions for review were filed in several courts of appeals within minutes of each other after public issuance by the Commission of its Opinion No. 546-A and order. The filing of a petition in the court below being first in time, review jurisdiction vested in that court. Petitions for review filed by producers and pipeline companies challenged the prescribed rates as too low and petitions for review filed by consumer representatives challenged them as too high.

By order of May 13, 1969, the court below granted a stay until hearing on the merits in June 1969, with this stay to expire no later than July 1, 1969. Thereafter, upon numerous producer requests for a later hearing, a conference was convened by the court below to consider these requests. As a consequence, the oral argument was postponed until October 6, 1969 and the Commission, at the court's request, stayed the ordered rate reductions (but no other aspects of its order) until October 13, 1969. The oral argument was held on October 6, 1969, before a panel of the court below which subsequently, by order issued October 17, 1969, vacated the submission of the cause to that panel and reassigned the case for argument and determination before an entirely new panel of judges of the same court. The stay of the Commission's orders was continued. The new panel heard oral argument on December 17, 1969.

Thereafter, on March 19, 1970, the court below, although expressing concern with respect to some aspects of the Commission's orders, sustained the Commission's orders in full, stating (App. A, pp. A. 69-70):

The orders of the Commission are sustained in full. The mandate of this Court should not, however, be interpreted to interfere with Commission action that would change the rates we have approved here. We specifically and emphatically reject the contention advanced by the MGD (SIC: MDG) that the Commission has no power to set aside rates once determined by it to be just and reasonable when it has reason to believe its determinations may have been erroneous.[124(10)] In fact, the existence of the new proceedings, which as we understand them will take into account many of the issues whose absence has concerned us here, has been one of the factors we have considered in deciding to affirm the Commission's decisions.[11]

[124] Section 16 of the Natural Gas Act, 15 U.S.C. § 717o (1963), gives the Commission power to "perform any and all acts, and to prescribe, issue, make, amend, *and rescind* such orders as it may find necessary or appropriate to carry out the provisions of this chapter." (emphasis and footnotes in parenthesis added)

[10] MDG made no such absurd contention. MDG challenged as unlawful the exemption in Opinion No. 546-A of third vintage offshore gas from the rate-change procedures prescribed in Opinion No. 546 and the limitation of the applicability of the rate-change procedures to third vintage onshore gas to only 5 years, because these actions were not based on evidence, on statutory authority, and were arbitrary and capricious. *Brief of MDG in court below, pp. 34-41.*

[11] The court's reference to a new proceeding is to a second round of area rate proceedings initiated by the Commission at Docket No. AR69-1 to review the rates prescribed in this proceeding and, if necessary, to prescribe new rates (41 FPC 306; Area Rate Proceeding, Docket No. AR69-1, order issued March 20, 1969 instituting investigation and order issued December 15, 1969 enlarging investigation). In the new area rate proceeding which is now in progress before a Presiding Examiner, any new rates would be effective from and after the date of issuance of a new order prescribing rates, consistent with the Commission's authority to fix rates only prospectively. Sections 4(e) and 5(a). *Hope Natural Gas Co. v. FPC*, 196 F.2d 803, 805 (CA 4, 1952).

Petitions for rehearing were filed by the producer and pipeline petitioners. These petitioners, *inter alia*, agreed that the Commission, notwithstanding affirmance, may modify its orders for the future and the rates to be charged prospectively, but expressed grave doubts that the Commission could revise the rates prescribed in Opinion No. 546, as modified by Opinion No. 546-A, retroactively. Producer and pipeline petitions for rehearing, therefore, urged the court below, as a means of preserving the Commission's authority to revise the rates retroactively, to grant rehearing, and upon such rehearing, to either instruct "the Commission to make further findings on issues deemed deficient by the Court" or to "grant the Motion for Leave to Adduce Additional Evidence heretofore filed" (e.g., Petition for Rehearing of Humble Oil & Refining Company and Humble Gas Transmission Company, pp. 3, 9; Amerada Hess, et al., pp. 2-3, 9-10).

On May 11, 1970, the court below directed the Commission and other parties to the review proceedings to respond to two questions:

> (1) Whether the Federal Power Commission has authority to stay, modify, or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.
>
> (2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify, or rescind the order if the circumstances seem to make these actions advisable.

Responses were filed by MDG, the New York Public Service Commission, Associated Gas Distributors (a group of private distributors of natural gas), and the Commission.

The Commission unequivocally advised the court below in response to Question No. 1 that the Commission "has no authority to prescribe or permit retroactive rate changes", and has authority to modify, rescind, or set aside a rate order or moratorium affirmed by a court "*only prospectively* from the date of a subsequent Commission order" (emphasis the Commission's). The Commission stated that it is "also clear that Courts have no authority to order reparations under the Gas and Power Acts". (Commission Response, pp. 2-3). "Therefore", the Commission concluded, "prospective changes in rates—increases or decreases—are the method by which the Commission adjusts for circumstances appearing since the entry of an order, unless the reviewing Court otherwise directs" (id., p. 3).

With respect to the second question, the Commission stated that the extent of the Court's equitable powers under Section 19(b) of the Act "apparently has not been decided". Referring to the powers conferred upon the court by Section 19(b), to instruct the Commission to reconsider the record under standards set by the court, or to reopen the record for specific purposes and to submit any modification of the rate order for further review, without necessarily reversing and vacating the order, the Commission concluded that any "equitable powers which would transcend these statutory powers would be determined by this Honorable Court." (Ibid., p. 4).

Commenting on the petitions for rehearing, the Commission said (Ibid., pp. 4-5):

> Comment on the petitions for rehearing will be limited to one point. The petitions reflect doubt, disagreement and controversy over whether this Court intended to authorize this Commission to make retrospective adjustments, if it deemed appropriate, in the rates set in Opinion 546 and 546-A *as of the effective date of the Commission opinions* (October, 1968) to the present or whether the Court intended, by use of the words 'sustained in full' (slip op. pp. 2, 69), to restrict the Commission to

> prospective changes from some future date when subsequent Commission orders, if any, are issued lifting the moratoria or establishing a new just and reasonable rate. (emphasis the Commission's)

Concluding its response, the Commission, over the vigorous dissent of Commissioner O'Connor, in which Chairman Nassikas joined, by a 3 to 2 vote, requested a remand in "order that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion" (Ibid., p. 5).

MDG responded to both questions in the negative and opposed the request for remand, as did the Associated Gas Distributors and New York Public Service Commission.

In the meantime, the Commission's orders on review continued to be stayed. Finally, on June 16, 1970, the petitions for rehearing were denied in a per curiam opinion. The court below stated (App. B, pp. B. 2-3):

> . . . We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.
>
> At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by

> the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.
>
> In all other respects, the original opinion of this Court is the final disposition of this appeal.

Subsequently, the court below denied producer applications for stay of the mandate, but on July 2, 1970, acting on its own motion, and without notice, the Commission entered an order continuing the stay of Opinions No. 546 and 546-A and accompanying orders.[12]

On July 2, 1970, certain producers, based on the decision of June 16, 1970 of the court below, filed a motion for continuation of the stay and for reopening of the proceedings and consolidation thereof with the new, second round of Southern Louisiana area rate proceedings at Docket No. AR69-1 and for retroactive reconsideration of the rate levels and refund requirements of the orders affirmed by the court below. Pending also before the Commission are petitions by two producers for exemption from the refund requirements of the orders.

REASONS FOR GRANTING THE WRIT

The questions presented by the June 16, 1970 ruling of the court below are of substantial importance in the administration of the Commission's rate-making responsibilities

[12] MDG has filed an application for rehearing of the Commission's July 2 order continuing the stay on the ground that the order is beyond the Commission's power.

under the Natural Gas Act and under the Federal Power Act.[13] The ruling of the court below is in conflict with a consistent line of decisions of this Court regarding the rate-making powers of the Commission.

This proceeding involves huge sums unlawfully exacted from consumers that the producers under the ruling of the court below would retain despite the clear requirement of the Gas Act that the excessive charges are the rightful property of the consumers for whose protection the Gas Act was passed.[14] Additionally, there is at stake the preservation of the regulatory scheme enacted by Congress, "so framed as to afford consumers a complete, permanent, and effective bond of protection from excessive rates and charges". *Atlantic Refining v. Public Service Commission*, 360 U.S. 378, 388 (1959).

Under the Commission's opinions and orders in this case, the just and reasonable rates prescribed by the Commission, which have been sustained in full by the court below, are effective as of September 25, 1968. These just and reasonable rates have never been permitted to become effective. During the entire period of court litigation the rates were stayed and following issuance of the mandate and dissolution of the stay, the Commission, on its own motion, on

---

[13] The Natural Gas and Power Acts are companion statutes. Under the former the Commission regulates sales at wholesale and transportation of natural gas in interstate commerce, and under the latter the Commission regulates interstate transactions of electric utilities. Cases interpreting the Gas Act have been cited in cases interpreting the Power Act and vice versa. Both acts "grew out of the same judicial history". *FPC v. Southern Cal. Edison Co.*, 376 U.S.205, 211-14 (1964).

[14] *FPC v. Hope Natural Gas Co.*, 320 U.S.591, 610 (1944); *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 (1962); *Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 388, 389 (1959); *FPC v. Interstate Gas Co.*, 336 U.S. 577, 581 (1949).

July 2, 1970, stayed the effectiveness of the rates.[15] As a consequence, the consumers have yet to realize the rate reductions ordered by the Commission and to receive the refunds required by the Commission's orders. In fact, a veritable avalanche of rate increases filed by the pipeline companies since the Commission's orders were issued in this case reflect, in substantial part, in the pipeline companies' cost of gas purchased the level of producer rates declared unlawful by the Commission.

Since September 25, 1968, consumers have paid enormous amounts of money in excess of the just and reasonable rate levels that are required to be refunded. The ruling of the court below has placed in jeopardy consumer funds totalling at the present time a minimum of $340,000,000.[16] Producers have filed applications with the Commission for retroactive modifications of the rates prescribed, based on the ruling of the court below, which would deny the reductions and refunds to the consumers.

If the ruling of the court below stands, bestowing retroactive rate-making power on the Commission, the "complete, permanent, and effective bond of protection from excessive rates and charges" intended by Congress will have no viable existence. There will no longer be protection of refunds, no finality of decision as to the past, no certainty,

[15] The issuance of the Commission stay, after affirmance, has been separately challenged by MDG by petition for rehearing to the Commission as beyond the Commission's power and as violative of the requirements for stay.

[16] In a petition for rehearing filed in the court below by Humble Oil & Refining Company and six other major producers at page 6 of the petition, the reductions and refunds were estimated to be $170,000,000 per year based on 1966 sales volumes. Two years have passed since the effective date of the Commission's order so that the accumulated reductions and refunds are at least $340,000,000. They are undoubtedly much larger since gas use has risen dramatically after 1966 by reason of demands for gas generated by environmental considerations, such as pollution abatement by firing industrial boilers with gas in lieu of oil or coal.

and there may be financial jeopardy for distributors of natural gas, private and public.

Consider the consequences on distributors of retroactive rate increases. If retroactive increases were to be granted the producers, the Commission would be impelled to grant retroactive increases to the pipeline companies to protect their financial integrity. But the Commission could do nothing for the distributors who could not through state regulatory action secure retroactive rate increases. The result would be financial disaster for distributors.

1. The decision of the court below is in conflict with the decisions of this Court and of circuit courts of appeals that have considered the issue. The Commission's rate-making powers are prospective only. It has neither retroactive rate-making nor reparations powers.

The rate-making powers of the Commission are found in Sections 4 and 5 of the Act. The gas operator may, unless otherwise bound by contract or precluded by lawful Commission regulations, file changes in rates with the Commission under Section 4(d) of the Act which may be made effective within 30 days after filing, subject to the five-month suspension provision of Section 4(e). If suspended, the increased rates may be made effective at the end of the suspension period in the event the Commission's investigation into the lawfulness of the increased rate has not been concluded, subject to the posting of a bond to refund the portion of the increased rates or charges found not justified. *Section 4(e).* "This not only gives the natural gas company opportunity to increase its rates where justified, but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases". *Atlantic Refining v. Public Service Comm'n,* 360 U.S. at 389. At the conclusion of the investigation "the Commission may make such orders with reference thereto as would be proper in a proceeding initiated" under Section 5(a) "after it had become effective", Section 4(e): *Hope Natural Gas Co. v. FPC,* 196 F.2d 803, 805 (CA 4, 1952).

"The overriding intent of the Congress to give full protective coverage to the consumer as to price is further emphasized in § 5 of the Act, 15 U.S.C. § 717d, which authorizes the Commission *sua sponte*, or otherwise to institute an investigation into existing rates and charges and to fix them at a just and reasonable level" which "rate found by the Commission to be just and reasonable becomes effective prospectively only". *Atlantic Refining*, 360 U.S. at 389.

This Court has unequivocally declared that the Commission has no retroactive rate-making powers and that neither the Commission nor the court has the power to award reparations. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *Montana-Dakota Util. Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951), and see 341 U.S. at 258 for concurrence of the dissenting opinion on this point; *FPC v. Sunray DX Oil Co.* 391 U.S. 9, 24 (1968). To the same effect are decisions of the circuit courts of appeals. *State Corporation Commission of Kansas v. FPC*, 215 F.2d 176, 183 (CA 8, 1954); *Hope Natural Gas Co. v. FPC*, 196 F.2d 803, 805 (CA 4, 1952).

In *FPC v. Hope Natural Gas Co.*, 320 U.S. at 618, this Court said:

> It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'

In *Montana-Dakota, supra*, the court was unanimous on the point that the Commission has no power to grant reparations and that the Commission's rate-making authority was only to grant prospective rate relief. (Cf. 341 U.S. at 254 and 258). On these points as to which there was no dissent, the dissenting opinion said (341 U.S. at 257-58):

> We face at the outset the contention that this section confers on the Federal Power Commission authority to award reparations for unreasonable rates collected in the past. Federal railroad rate legislation gave such a power to the Interstate Commerce

> Commission. . . . But it was not given to the Federal Power Commission. It was withheld deliberately. See S.Rep. No. 621, 74th Cong. 1st Sess. 20. Wholesale consumers of electric energy were apparently considered, as a rule, adequately protected by the provisions of the Act authorizing the Commission to grant prospective relief and, in certain circumstances, to order refunding of sums accumulated during the pendency of rate proceedings. . . . Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it clear that Congress did not intend either the court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has in fact been unreasonably high or low. . . .[17]

In *State Corporation Commission of Kansas, supra,* the Eighth Circuit held that (215 F.2d at 183, 184):

> Under Section 4(e) the Commission may order a refund with interest of rates or charges which it has decided not to be justified but its power to fix rates is prospective only and those it fixes are applicable to the future.
>
> * * *
>
> . . . The Commission's legislative fixing of rates must necessarily relate to the future and the Commission lacks power to grant reparation where a rate has proved on application to be confiscatory.

The reliance of the court below on Section 16 is misplaced. Although Section 16 may support "a generous construction of" the Commission's "statutory authority" (*Permian Basin Area Rate Cases,* 390 U.S. 747, 776 (1968)), the broad grant of authority of Section 16 "to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules, and regulations as it may find necessary or appropriate," cannot be exercised, nor construed, in

---

[17] Although the Court was discussing the rate-making provisions of the Power Act, the decision applies with equal force to the virtually identical rate-making provisions of the Gas Act. *Supra,* footnote 13.

derogation of any of the more specific mandates or prohibitions of the Act or its purposes. Indeed, this broad grant of authority is by the terms of Section 16 expressly conferred "to carry out the provisions of this act"; not to act in derogation of the provisions or to contravene them.

2. The court below also erroneously ruled that the Commission has power to rescind retroactively a court affirmed rate order. The pertinent review provisions, Section 19(b), are as follows:

> Upon the filing of such petition (for review) such court (of appeals) shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify or set aside such order in whole or in part.
>
> * * *
>
> The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari . . . (material in parenthesis supplied)

Under these provisions, the Commission's power to revise an order remains with the Commission only until such time as the record on review has been filed with the court of appeals. *Pan American Petroleum Corporation v. FPC*, 322 F.2d 999, 1004 (CADC, 1963). Thereafter, when affirmed on appeal, the Commission has no authority to modify the order. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *State Corporation Commission of Kansas v. FPC*, *supra*, 215 F.2d at 184. When the order is affirmed, the judgment of the court of appeals is final subject only to review by this Court upon certiorari or certification. See also: *International Union v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339, 340 (1945). This is not to say, however, that the Commission may not, as it has at Docket No. AR69-1, commence new proceedings to consider whether changes in circumstances since issuance of the orders in this case in the Southern Louisiana Area warrant prospective re-

vision of the prescribed rates. Cf. *FPC v. Amerada Petroleum Corp.*, 379 U.S. 687, 690 (1965). But the authorities disclose that once a decision has been made and affirmed by a court, the case should not be subject to relitigation of the same issues. This Court said in *International Union, supra*, at 340-41:

> Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation. The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them.
>
> * * *
>
> Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction. This does not mean that the Board could not frame an order which by its terms required modification should conditions change. . . .

3. Clearly erroneous, also, is the ruling of the court below that it has equitable powers, notwithstanding affirmance of the orders, to revise the rates and provisions of the rate orders retroactively, and that it may confer, and has conferred, its equitable power on the Commission so that the "Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so." (App. B, p. B. 2).

Whatever the lower court's undefined equitable powers may be, they cannot be used to confer upon the Commission broader powers than Congress conferred, *Public Service Comm'n of New York v. FPC*, 257 F.2d 717, 722 (C.A. 3, 1958).

> The jurisdiction of the FPC is entirely statutory. It acts as an arm of Congress and only as Congress has directed it.

This Court has ruled that powers withheld from the Commission by Congress cannot be conferred by the courts in

the exercise of their equitable powers. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951). And the Eighth Circuit has reached the same conclusion, upon consideration of Section 19(b), in *State Corporation Commission of Kansas, supra*, at 184:

> It is pointed out that in rate regulation such as is here involved the Commission's legislative fixing of rates must necessarily relate to the future and the Commission lacks the power to grant reparation where a rate has proved on application to be confiscatory. The court is also limited strictly to the exercise of judicial power and has no power to fix rates or to accord reparations on account of insufficiency of rates in the past. . . . There is no place in the proceeding for either the Commission or the court to accord reparation.
>
> * * *
>
> We conclude . . . That such recovery of reparation is not sanctioned by Section 19(b) and is contrary to well settled law.

See also: *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931): "If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; *nor can they be created by the courts in the proper exercise of their judicial functions.*" (emphasis supplied)

Finally, the ruling of the court below goes beyond its powers as conferred by Section 19(b): the court may require the Commission to take additional evidence, if application therefor is made by a party to the review proceedings and may affirm, modify, or set aside the orders on review in whole or in part. The court below denied the producer-petitioners' motions for leave to adduce additional evidence and affirmed the orders. The court emphasized that its "judgment is an affirmance and not a remand." (App. B, p. B. 2). In these circumstances, there is no occasion and no basis for the exercise of the court's equitable powers. Indeed, there are no funds for disposition within

the court's jurisdiction to which its equitable powers might apply. *FPC v. Interstate Gas Co.*, 336 U.S. 577, 582-83 (1949).

CONCLUSION

This petition for a writ of certiorari should be granted and the judgment of the court below on the questions presented should be reversed without further briefs or argument since the decision of the court below on these questions is so clearly contrary to, and in conflict with, the Natural Gas Act and decisions of this Court and circuit courts of appeals.

Respectfully submitted,

Reuben Goldberg
Leo J. Steffen, Jr.
1250 Connecticut Avenue
Washington, D.C. 20036

George E. Morrow
Union Planters National Bank Bldg.
Memphis, Tennessee 38103

Charles F. Wheatley, Jr
Watergate Office Building
2600 Virginia Avenue
Washington, D.C. 20037

Attorneys for Municipal Distributor Group